# BRIEF FOR APPELLEES

IN THE

# Supreme Court of the United States.

THE SMITHSONIAN INSTITUTION, *Appellant*,

*vs.*

LEVI W. MEECH ET AL, *Appellees.*

**No. 190.**

## BRIEF FOR APPELLEES.

### Statement of the Case.

On the 20th of April, 1885, one Timothy Sands, by his deed of indenture of that date, conveyed in fee-simple the property in controversy in this case to Lydia T. Avery, then the wife of Robert S. Avery, "unto and to the only use and benefit of said Lydia Tyler Avery, her heirs and assigns." The deed on its face recites a consideration of $3,500 to the grantor "in hand paid by the said party of the second part."

Without having in any way disposed of this property, Mrs. Avery died intestate on the 10th of November, 1890. There were no children of the marriage. The heirs of Mrs. Avery are Levi, Stephen and William Meech, and Lucy M. Lord, who are the real parties in interest in this case.

On the 12th of September, 1894, Robert S. Avery, the husband, also died. By the residuary clause of his last will and testament, dated July 22, 1893, he devised and bequeathed nearly all of his estate, real and personal, to the Smithsonian

Institution. Following the residuary clause of his will he uses the following language:

"The property known as part of lot 2 (two) in square 787, in the city of Washington, D. C., being premises No. 326 A St. S. E., is my property, although the title stands in my wife's name. I include it in the residuary bequest to the Smithsonian Institution."

The property thus described is that which was conveyed, as above stated, to Mrs. Avery and of which she died intestate.

By virtue of this clause the Smithsonian Institution claims the property and has filed this bill against Mrs. Avery's heirs to enforce its alleged title.

The material averments of the bill in respect of the testator's alleged title to the property and his right to devise it to the complainant are, first, that Mr. Avery paid from his own means the purchase-money, though directing the deed to be made to his wife; and, secondly—

"That at the time of the purchase of this property by Mr. Avery it was *expressly agreed* by and between himself and his wife that said premises were to be deeded to her, not to give her the fee-simple title to the same nor even to give her a life interest absolutely therein, but solely for the purpose of providing for her in the event of her husband dying before she should die, as that appeared almost certain would happen, and that Mrs. Avery was to make her will, giving the same to her husband, so that the general purpose of his will should apply to this after-acquired real estate."

Filed with the testimony (Rec. p. 30) is an affidavit of Mr. Avery, referred to in the bill (Rec. p. 5.) This affidavit was made two years after the death of his wife, and an extract from it is here given as showing the character of the case presented by the bill, as the affidavit may be said to be a part of it:

"At the time of said purchase he [Avery] was not in good health, and his wife, Lydia Tyler Avery, being of the opinion that

she would outlive him, he permitted said property to be tranferred to her upon the then *expressed condition* that she was to make a will in his favor in the event of his surviving her, as he had already done in her favor in the event of her surviving him, the mutual understanding being that the combined property was to be left to the survivor during life and then to be disposed of by will for scientific or educational purposes, as had already been talked over *and agreed upon by them* in conversations between them, this disposition of all *their* estate being so made in consequence of their married life not having been blessed with children."

It should also be stated that by his will above referred to Mr. Avery bequeathed, among other legacies, a legacy of one thousand dollars to the appellees above named, who are the heirs of Mrs. Avery and are claiming the property in controversy as such heirs. The will also contained the following clause:

"These bequests are all made upon the condition that the legatees acquiesce in this will, and I hereby bequeath the share or shares of any disputing this will to the residuary legatees hereinafter named."

The residuary legatee is the Smithsonian Institution.

To establish its supposed title to this property the Smithsonian Institution on the 4th of June, 1895, filed the bill in this case. The bill avers the death of the testator, sets forth the conveyance by Sands to Mrs. Avery; avers the payment of the purchase-money by her husband and the circumstances under which the purchase was made and the deed executed, the material facts in regard to which are above set forth. The bill then in substance prays that the heirs be decreed to have forfeited the $1000 legacy "for breach of condition annexed to said legacy," and that the "equitable title" of the testator to the property in controversy be declared to be "by virtue of his will vested in the Smithsonian Institution."

The answer of the heirs of Mrs. Avery in substance denies that the testator had any interest, legal or equitable, in the said real estate, and asserts their claim to the property as such heirs and to the $1000 legacy.

Issue was joined, testimony was taken, and on the hearing before the Special Term the prayers of the bill were sustained, as set forth in the decree on page 56 of the Record.

From this decree all the defendants (except Julia Avery, the executrix, who is a mere formal defendant), appealed to the Court of Appeals of the District, where the decree below was reversed and the bill dismissed, Meech *vs.* Smithsonian Institution, 8 Court of Appeals D. C., 490. And from that decree the Smithsonian Institution has appealed to this court.

Mr. Justice Hagner of the Special Term before whom this case was first heard delivered an opinion in which he found in favor of the appellants, the Smithsonian Institution. The Court of Appeals in reversing that opinion said:

"We have no desire to dissent from the statement of the law by the learned justice who heard this case in the court below, as contained in his very able and elaborate opinion which we find in the Record; ***but we fail to find in the record the testimony which in our opinion is required to support it.***

## Argument.

There are two controversies in this case and they involve respectively:

1st. The right of the appellant to the real estate described.

2d. The right of the appellee to the $1,000 legacy.

Each will be considered in its order.

I.

With respect to the real estate the bill may be considered either as a bill seeking (*a*) to establish a resulting trust or (*b*) as a bill to enforce ***a parol agreement to make a will*** devising the real estate in controversy. With respect to the latter proposition we submit that if ever the complainant's counsel really regarded the averments of the bill as calling for relief of that

nature he completely abandoned it when he came to offer his evidence. Not one syllable from the beginning to the end of the testimony supports the statement in the bill "that at the time of the purchase of this property by Mr. Avery it was expressly agreed by and between himself and his wife * * * that Mrs. Avery was to make her will giving the same to her husband."

But a single witness (Shidy, Rec. p. 39) testifies in regard to any agreement to make a will, and his testimony, indefinite and vague as it is, if it establishes anything, establishes an agreement to make "a will transferring it at her death to the Smithsonian Institute," whereas the averment of the bill, as we have seen, is that she agreed to make a will "giving the same to her husband." The complainant, of course, must prevail, if at all, *secundum allegata et probata;* but aside from that, this witness says in respect of his testimony:

"I do not pretend to give an exact verbal statement of what took place at the time, because these events occurred something like ten years ago, and my memory of them would not be vivid enough to give the precise words, but I am very confident in regard to the *tenor* of what was said and done at the time."

In McCormick *vs.* Hammersly, 1 Court of Appeals D. C., at p. 320, that court said that while under some circumstances an agreement by a wife with her husband to make a will might be enforced in equity, yet it intimated very strongly that the agreement must be "fully proved;" that he must establish "beyond a reasonable doubt the allegations of his bill." See also Semmes *vs.* Worthington, 38 Md., 298; Fordy *vs.* Williams, *id.* It is hardly necessary to further argue that in the case at bar neither the allegations of the bill nor the evidence offered come within speaking distance of such requirements.

Leaving, then, this aspect of the controversy, let us consider whether the bill or the proof offered to sustain it establishes a resulting trust in favor of the complainant.

II.

It is submitted that the very allegations of the bill itself negative the existence of a resulting trust. It sets up clearly and specifically *an express agreement* between the husband and wife that the wife should take the property for life, and in the event of surviving him that she would devise it to the Smithsonian Institution, but if she should die before him she would devise it to him. Of course this is not a resulting trust, but an *executory agreement*, which in the case of real estate must be established by evidence in writing "signed by the party to be charged," and even then under the circumstances of this case could not be enforced, for the appellant is a mere volunteer, and it is well settled that courts of equity will not enforce a contract in behalf of one from whom no consideration proceeded.

Fry Specf. Perf., § 92.

The Court of Appeals of this District has in three well-considered cases of comparatively recent date expressed its views upon the doctrine of resulting trusts. In Cohen *vs.* Cohen, 1 Court of Appeals, p. 240, it said:

"Where a purchaser takes the conveyance, not to a stranger, but to his wife, the presumption of a resulting trust that arises where the grantee is one for whom he is under no natural, moral, or legal obligation to provide is rebutted, and the contrary presumption arises that the purchase and conveyance was intended as a gift or advancement to the grantee.

"It is universally held that, while parole evidence will be received, all the facts necessary to establish the resulting trust must be proved with *clearness and certainty*, and they must not only be certain, but consistent with each other and the alleged intent of the parties. The necessity for clear and satisfactory proof is still stronger in a case like this, *where the transaction is an old one, the wife dead*, and her heirs-at-law helpless children."

Similar views were expressed by it in Cooksey *vs.* Bryan, 2 Ct. of App. D. C., 557; McCormick *vs.* Hammersly, 4 Ct. of App., 320; and in Levis *vs.* Kengla, 8 Ct. of App. D. C., 230, this court said:

"The trust sought to be raised is not the resulting trust that is expressly reserved from the operation of the statute by the terms of the statute itself. That resulting trust is one arising by implication or construction of law. The trust here alleged is an *express* trust created by express agreement to that effect by the parties themselves. If the statute may be avoided or evaded by designating an agreement as a trust, it is difficult to see wherein it can be enforced at all."

In Jackson *vs.* Jackson, 91 U. S., 125, a case where a husband sought to establish a resulting trust as to property standing in his wife's name, Mr. Justice Field delivering the opinion of the Court said:

"But no presumption that a personal benefit was intended to the party advancing the funds for a purchase in the name of another can arise where an obligation exists on his part, legal or moral, to provide for the grantee as in the case of *a husband for his wife* or a father for his child. The circumstance that the grantee stands in one of these relations to the party is of itself sufficient evidence to rebut the presumption of a resulting trust, and to create a contrary presumption of an advancement for the grantee's benefit."

The fundamental error committed by Mr. Justice Hagner in his opinion which was reversed by the Court of Appeals, was in failing to recognize with sufficient accuracy the technical limitations which surround resulting trusts and confine them to certain well-defined facts.

A resulting trust in real estate *ex vi termini* is a trust which results *back* to the creator of the trust, and is for his benefit *solely* and not for the benefit of some third party. It is created not by the *agreement* of the parties (for then it is an *express* trust), but arises and grows out of the existence of certain facts entirely independent of agreement. One of the few cases in which it can arise in respect of real estate is where the consideration or purchase price for the property is furnished by one person and the title is taken by another, there being an entire absence of any *agreement* with respect to

the manner in which the title is to be held, for if there be an agreement as to the holding of the title, then the transaction is *controlled* by that agreement, but if there be no agreement, then the law steps in and controls it and declares that a trust arises for the benefit of the person from whom the consideration proceeded and that the person in whom the legal title is vested shall hold it in trust for the former. This is the only way in which a resulting trust can operate, viz., for the sole benefit of the party from whom the consideration proceeded. It cannot operate so that any other or third person shall become the beneficiary or *cestui que trust.* (1 Perry on Trusts, §§ 133, 134; Jackson *vs.* Ringland, 4 Watts & Sargt., 149; Thompson *vs.* Thompson, 180 Ohio St., 73; Bottsford *vs.* Burr, 2 Johns. Ch., 408; Lothrop *vs.* Hoyt, 7 Barb., 60; Dorsey *vs.* Reading, 8 Sargt. & R., 484.) Now, in the case at bar we have a transaction in which it is claimed that Mr. Avery paid the purchase-money,* but the legal title was taken by Mrs. Avery, and the trust which it is said arose from this transaction is *not* that Mr. Avery became *immediately* entitled to the beneficial interest, but that Mrs. Avery thereby became entitled to enjoy the property *for her life,* and in case she survived her husband it was to go upon her death to the Smithsonian Institute, and if she did not survive him, then it was to go to him for his *life,* and on his death to the Smithsonian Institute in fee. Such a trust could, of course, arise only by an agreement evidenced by a writing signed by the party to be charged. It has no more likeness to a "resulting trust" than a bill in equity has to an indictment for petty larceny. In a resulting trust there are no qualifications of the estate to be held by the parties. A, who pays the purchase-money, takes the same estate in equity that B, the legal grantee, takes at law. The law does not declare that if A pays the purchase-money and the legal title is taken by B

*The proof that Mr. Avery paid the purchase-money the Court of Appeals very correctly said was not "by any means satisfactorily proved." (Rec. 74.)

the latter shall hold the estate *for his life* and then on his death A shall take it. A must take the beneficial use *eo instante* the legal title vests in B. (1 Perry on Trusts, § 133.) That is the *only* trust that the law creates by reason of the facts. If any other conditions are attached to the trust it must be by the agreement of the parties; whereupon *ipso facto* it is not a resulting trust, but an executory contract.

It is clearly evident, therefore, that the trust which, it is contended in the case at bar, exists for the benefit of the Smithsonian Institution cannot be established except by evidence in writing signed by Mrs. ery, and it is not contended that there is any such eviden n this case.

We insert here a few tations which, we submit, amply sustain the foregoing propositions:

"Under section 7 of the statute of frauds declarations of trust or confidence, if proved by verbal evidence only, are utterly void and of no effect; but a trust which arises by operation of law, *independently of any declaration whatever*, viz., a resulting trust; is expressly excepted from the operation of the statute by section 8 thereof." (Bish. Equity 97; Groff *vs.* Rohrer, 35 Md.)

"The courts look with dislike upon receiving proof of trust by parole, and have reluctantly adopted the rule in equity. They receive the evidence with *great hesitation* and consider it most unsatisfactory and will not admit it where there has been lapse of time by death [in the case at bar *both* the parties are dead], or if it is loose and ambiguous, and it will be received only to show *facts* from which the law, *without any declarations of trust or agreement of the parties*, implies a trust. It is to be received with caution, and must be evidence *so strong* as would induce a chancellor to decree a conveyance, and *loose evidence of conversations is insufficient.*" (Reed on Stat. of Fr. sec. 974 *et seq.*; Cohen *vs.* Cohen, 1 Court of Appeals D. C., 240; Cooksey *vs.* Bryan, 2 Court of Appeals D. C., 557; Levis *vs.* Kengla, 8 Court of Appeals D. C., 230.)

The only evidence in the record is that of "loose conversations" held with an old lady whom one of the witnesses for the appellee swore he believed to be *mentally* unbalanced, and

he says he was "in a position to know." Her talk was "random talk." "I should not consider such a person responsible for half she *said* or did." (Rec. p. 38.)

"The attempt to create and to enforce a specific trust, from the loose and equivocal expressions of the parties made at different times and upon different occasions, would be inconsistent, not only with the spirit and policy of the statute of frauds, but with the general rules of evidence." (Slocum & Wife *vs.* Marshall, 2 Wash. C. C., 308; Thomas *vs.* Standiford, 49 Md., 181.)

"While the transaction out of which a resulting trust arises may be proved by parol, the trust itself must rest upon the acts and situation of the parties as proved, and not merely upon their declarations." (1 Beach Eq. Jur., § 223; Foote *vs.* Bryant, 47 N. Y., 544.)

"The possession of the estate and receipt of the rents will not rebut the presumption [that the conveyance was a gift by husband or father] nor disbursements in repairs on the estate and the like." (1 Beach Eq. Jur., sec. 222 and authorities cited, and see sec. 224.)

In the face of this well-settled proposition as to rents and disbursements, Mr. Justice Hagner in his opinion, which was reversed by the Court of Appels, alludes to the fact (Rec. p. 64) that the husband collected the rents as tending to sustain the appellee's contention of a resulting trust. We had always supposed that the husband, as agent of the wife, almost always collected the rents of his wife's property, but never supposed it could be used as a fact to assist him or third parties in depriving the wife of her estate therein.

Moreover, the learned justice seemed to have forgotten his own (although incorrect) statement (Rec. p. 62) of Shidy's testimony, viz., that the conveyance was "upon the *avowed agreement* that it was to be enjoyed by her only as *tenant for her life* and only if she should survive her husband, and should be received by the Smithsonian Institution immediately upon the death of the survivor for the scientific objects that both so earnestly desired to foster." So that the fact that the wife

allowed her husband to collect the income of an estate which he admitted was hers during her life tends to prove "the true intention of the parties" (Rec. p. 63), viz., that the Smithsonian Institution was to become the final beneficiary of the property! Could fallacious reasoning go further than this?

"Nor will the payment of taxes and the making of improvements by the husband rebut the presumption that the conveyance was a gift to the wife." (Maxwell *vs.* Maxwell, 109, Ill., 588.)

So, again, the learned judge of the special term relied largely on what he conceived to have been in evidence, viz., declarations by the wife that she held the property in trust, while in point of fact there is not an iota of such evidence, the learned counsel for the appellant is challenged to point to any evidence containing such a declaration. Mrs. Bumpus says "she always said it was her property," and Mrs. Bradley says "she always spoke of it as 'my' house. Every time I met her, I do not think I met her that she did not say something about 'my' house." Both of these are plaintiff's witnesses. Yet, even if there were such declarations, all the authorities say:

"Mere declarations of the trustee [the wife] are not sufficient to establish a resulting trust. Such evidence is unsatisfactory from the danger of mistake and may easily be misinterpreted unless corroborated by circumstances." (Reed St. of Fr., § 976.)

The language of the *tenendum* is "unto and to the *only* use and benefit of said Lydia Tyler Avery, her heirs and assigns."

"Nor can a resulting trust arise where the *use* is expressly limited to the grantee in a deed." (Am. Encyl. Law, vol. 10, p. 14.)

"In these cases there can be no implied trust, for the grantor by expressly declaring the trusts [*i. e.* the use] upon which the deed is made leaving nothing to implication." (1 Perry on Trusts, § 162; Donley *vs.* Bradley, 119, Ill., 412; Alexander *vs.* Warrance, 17 Mo., 228; Dean *vs.* Dean, 6 Conn., 285.)

It is said, however, that this rule only applies as between grantor and grantee; that where a third party pays the purchase-money he is not estopped by the recital of the grantor's deed, but it may well be doubted, whatever may be the rule otherwise, whether as between husband and wife, where the husband is cognizant of the language of such a deed, he can afterwards contradict it by parol. In the case at bar it is in evidence that Mr. Avery himself received the deed and it must be presumed that he read it, and if he read it he saw that the conveyance was "unto and to the *only* use and benefit of said Lydia Tyler Avery, her heirs and assigns."

It is also a serious question whether when a husband purchases property in the name of his wife a resulting trust arises. Washburn Real Prop., Vol. 2, p. 475, says there cannot be "for the reason that a wife cannot be a trustee for her husband;" and Story says "the presumption [of an advancement] is stronger *in the case of a wife* than of a child, for she cannot at law be a trustee for her husband" (Story Eq. Jur., § 1204). The language of the Supreme Court of the United States, in Jackson *vs.* Jackson, 91 U. S., 122, would seem to be of similar import. But while it is conceded that parol proof has been held admissible to rebut the strong presumption of an advancement in cases where the deed is an ordinary feoffment, yet we insist that in case of a purchase by a husband in the name of the wife, where the deed expressly and with the knowledge of the husband limits the use "unto and to the only use and benefit" of the wife, the evidence necessary to overcome such presumption, even if it can be by parol proof, must be very strong, indeed.

The most that is claimed for the evidence in this case is that Mrs. Avery, at some time or other, declared that her husband furnished the money to purchase this property and that she *intended* to give it to the Smithsonian Institution on her and his death; but many people have *intended* to make a will and then died without doing so.

"If a husband conveys his lands to his wife upon the express trust to enable her to better manage and preserve his estate and to be applied by her in accordance with the provisions of his will before made and she agrees to carry out the trust, the same will fall within the statute of frauds if not created or evidenced in writing, and cannot be enforced if the defense of the statute be interposed." (Scott *vs.* Harris, 113 Ill., 448.)

Upon even stronger facts the courts have used the following language:

"The only evidence introduced in the case to establish a [resulting] trust was that of declarations made by the wife to the effect that the property *belonged* to her husband, and that she would convey it back to him whenever he wished her to do so. *These were declarations of an express trust* which could only have been proved by writing." (Price *vs.* Keen, 112 Mo., 412–419; Woolford *vs.* Stephens, 51 Mo., 443.)

"A mere admission in writing that parole promises to hold the land in trust were made at the time of the conveyance is not enough to give life to the trust." (1 Perry on Trusts, sec. 79.)

"The presumption arising from the conveyance, that it fully speaks the whole truth, must prevail until the contrary is established beyond reasonable controversy. The burden of removing this presumption rests upon the party asserting the contrary, and it is not enough for him to *generate doubt and uncertainty*." (Lehman *vs.* Lewis, 62 Ala., 129.)

"The burden rests *heavily* upon the plaintiff to establish against the record a passive trust resulting by operation of law from the payment of one person of the consideration of a deed taken in the name of another." (Whitman *vs.* Learned. 70 Me., 276.)

*A fortiori* would the burden be a heavy one when the conveyance is to the wife and the deed expresses it to be "to her only use and benefit."

In Lee *vs.* Browder, 51 Ala., 288, the admission of parole evidence to establish a resulting trust was called "one of the mistakes of equity.

The American Encyclopedia of Law, Vol. 10, p. 29, has collected some of the expressions used by the courts when defin-

ing the character of the evidence necessary to establish a resulting trust: "It should be very clear and received with great caution;" "clear and distinct or explicit;" "clear and satisfactory;" "not only satisfactory, but clear and undoubted;" "unquestionable;" "clearly sufficient;" "full, clear and convincing;" "most convincing and irrefragable."

The Act of 29th Charles II. is in force in the District of Columbia. (Williams *vs.* Morris, 5 Otto 444; Compiled Stats. D. C. 231.)

We shall now present an analysis of the testimony in the case at bar and we shall see how completely it fails to come up to the requirements of these expressions.

## The Evidence.

All the witnesses are those of the appellants. The appellees offered no oral testimony. The only evidence offered by them was a statement of Mrs. Avery's account with the Norwich Connecticut Savings Society (Rec. p. 55), showing her to have had considerable money of her own at one time (nearly $2,000). What became of it if a portion of it did not go directly or indirectly into this property? At all events, it contradicts one of the witnesses, who said that Mrs. Avery never had any means of her own.

GEORGE HAZLETON: "Sands was the owner of the property and wanted to sell it. He was a client of mine. I drew up the deed at the request of Mr. Sands and Mr. Avery. I will not say of his wife, for she *may* have expressed herself at the time as to something about it, but at their request I drew up the deed [that is, at the request of *Mrs.* Avery as well as of her husband]. I drew the deed up to her. The price and everything of course were agreed upon. Then a day or two after that they came back with the money, and Mr. Avery delivered the money on my table and it was counted there, and they took the deed and went away."

"Q. What part, if any, did Mr. Mrs. Avery take in the business transaction?

"A. Well, there was no dispute between them as to what was to be done. It was directed [it is not said *by whom*] that the deed be made to her, and there *seemed* to be an understanding between them that that was the way the deed should go.

* * * * * * *

"Q. Was anything said by her?

"A. It has been a long time ago. *I could not tell what was said*, but he paid the money over, and there seemed to be an understanding between them that it was all right, and that is all I could tell."

This is the only witness to the circumstances of the execution of the deed, and it is too clear for argument that not one word of this testimony points to any such arrangement as is claimed by the appellant. It is simply the case of a man paying money (without showing whose money*) and the deed being made out in the wife's name. In other words, Mr. Hazleton's testimony proves absolutely nothing to support the appellant's contention that it was the intention of the husband that the wife should take the property *sub modo* only.

LORENZO D. BUMPUS (Rec. 23) testifies to the leasing of the property to him by Mr. Avery on the 1st day of October, 1887, which was more than two years and a half after the execution of the deed. "Mrs. Avery did the bulk of the talking, but Mr. Avery did the business. She would say, 'You keep still, Mr. Avery; I want to talk.' He paid the rent to Mr. Avery, but Mrs. Avery was always present."

* * * * * * *

"Q. Did you have any conversation with Mrs. Avery with respect to whom this property should go after her death?

"A. Repeatedly.

"Q. State what was said.

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*The Court of Appeals said it would assume for the purposes of the case that the husband paid the purchase money "although we do not by any means regard it as satisfactorily proved." Meech *vs.* Smithsonian Institution, 8 Court of Appeals, D. C. p. 507. (Rec. p. 74.)

"A. She told me repeatedly that Mr. Avery and she *proposed* to leave whatever *they* had at their death to the Smithsonian Institute to establish an 'Avery fund' in the interest of science, and that whichever one died first the other one was to carry out the wishes of the two—that everything *they* had was to be left to the Smithsonian Institute."

Again, we have nothing from this witness to establish the trust claimed. The utmost that can be said of his testimony is that Mr. Avery and she *proposed* to make a will devising "whatever they had" to the Smithsonian; but that the property in question was conveyed to her on such condition nowhere appears. Many people, as we have said, purpose to make a will, but die without doing so.

ALICE L. BUMPUS (Rec. 26) is the wife of the preceeding witness. Her testimony proves the appellees' case; thus:

"She (Mrs. Avery) used to say that it was Mr. Avery's money; that he had earned the money, *and she claimed the property he had bought.*"

"She said that Mr. Avery had bought the property and told her *she could have it*, and she *always* said to me that it was *her property*.

"Q. Did she say anything about what was to become of the property after they died?

"A. Well, she said over to our house *once* that when they were through with it they *wished* it to go to the Smithsonian Institute."

Every word of this witness' testimony, it will be seen, is in direct contradiction of the case presented by the bill.

JOHN F. COX (Rec. 27). This witness testifies that he is an attorney-at-law; that he was professionally engaged as Mr. and Mrs. Avery's attorney to draw up a will for them; that in consequence of his *professional relation* with them he had a number of conversations with each upon the subject of the disposition of their property by will; that at these conversations certain statements were made by Mr. and Mrs. Avery, to which statements he undertakes to testify.

Of course the appellees objected and still object to these disclosures by an attorney of matters learned by him of his clients by reason of his professional relationship. They cannot be received as evidence. (See authorities cited elsewhere in this brief upon this point.)

But even if they were admitted they prove nothing to sustain the appellant's case. Not a word of his entire testimony goes to show that at the time of the execution of the deed and the taking of title by Mrs. Avery there was any agreement or understanding that she was to hold it simply in trust. It is true the witness gives his *opinion* about it, saying "she *regarded* this property that she held only in trust, *as it were*" (*sic*). Of course the witness could only say what she *said* and not what she "regarded."

The witness drew up an affidavit for Mr. Avery after Mrs. Avery's death. What Mr. Avery said *after* his wife's death as to the conditions upon which the title was put in her name, it is scarcely necessary to say, would not be evidence of anything *for* the appellant, but it would be evidence *against* it. The language of the affidavit forcibly and directly rebuts any idea of a resulting trust; if it proves anything it was an express trust. He says:

"He permitted said property to be transferred to her upon the *expressed* condition that she was to make a will in his favor in the event of his surviving her."

But on page 32 the witness negatives the entire case of the appellant so far as it is sought to prove declarations of Mrs. Avery as to the existence of any trust. He says:

"I do not recall that she [Mrs. Avery] ever stated to me that there was an arrangement or an agreement conditional on her taking the property."

HARMON M. BRUSH (Rec. 36) testifies that all he knows about the case is that when the $600 note was due Mr. Avery called

upon him and paid it. He says he had no conversation with Mrs. Avery at all; that he did not regard her mentally as responsible; that he considered her "off her balance and not capable of doing business. I always looked upon her as being half crazy."

"Q. You thought she was mentally unbalanced?
"A. *I did, and I was in a position to know.*"

This, be it remembered, is the appellant's own witness.

LELAND P. SHIDY (Rec. 39): This is the *one* witness whom the appellant relies upon as overcoming the sworn denials of the answer. He admits that the matters he is testifying occurred over ten years ago and that he can only give the *tenor* of the various conversations he had at different times with Mr. and Mrs. Avery. He says he was quite intimate with them. He used often to spend his evenings with them, and had frequent conversations with them about their property. "Some of the conversations took place before and some after the purchase" (p. 45), but he cannot tell which occurred before and which after the conveyance. He can only give his "conclusions" from the conversations they had (p. 45). "I do not pretend to give an exact verbal statement of what took place, because these events occurred something like *ten* years ago, and my memory of them would not be vivid enough to give the precise words, but I am very confident in regard to the *tenor* of what was said and done at the time" (p. 46).

Now, the witness, having testified that he could give only the tenor of these conversations had ten years previously, proceeds to give the "tenor" of them. It is plain that such testimony is not admissible to prove a resulting trust or a trust of any sort in land, which by all the authorities must be established by "strong, clear, and convincing evidence."

But here is what he gives as his *conclusions*, after ten years, as to what the *tenor* of the conversations were between himself and Mr. and Mrs. Avery:

"She wanted it in her name, in the first place, because she wanted to have *control* of that property, as it was immediately contiguous to her own house, and then she thought she would be pretty certain to outlive her husband, and that it would be better in case of his death to have the *title in her name.*"

"Q. State what final disposition, if any, was agreed upon by these two persons in your presence.

"A. It was *agreed* that she should have the property during her lifetime, and that she should make a will transferring it at her death to the Smithsonian Institute."

When this agreement took place, whether before or after the conveyances, and in what words it was expressed, the witness distinctly disclaims being able to state.

Of course, even if this witness' statement of the *tenor* of a conversation had ten years previously between two persons, both of whom are dead, could have any weight as evidence, it would not establish the averments of the bill. The witness does not state any *agreement* on the part of Mrs. Avery to will it to her husband at her death, but to the Smithsonian Institution, who is a mere volunteer; "from whom no consideration proceeded." and for whom courts therefore never enforce agreements (Fry Specif. Perf., §§ 92, 819); nor promises founded solely on benevolent intentions (Mercer *vs.* Stark, 12 Am. Dec., 583; Owings' Case, 1 Bland's Ch., 370). Moreover, the alleged agreement is directly in the teeth of the statute of frauds as to express trusts; and, more than all, Shidy is the *only witness* who in the face of the denials of the answer testifies to any *agreement* whatever or to any expressed intention of Mr. or Mrs. Avery prior to or at the time of the execution of the deed, if, indeed, it can be said, (in view of his statement that he cannot say *when* any particular conversation took place, whether before or after the conveyance,) that *this* particular conversation occurred before the execution of the deed. All the other witnesses testify to chance expressions in conversations had long *after* the conveyance. It is, of course, settled that the denials of the answer must be contradicted by at least two witnesses

or one witness and corroberating circumstances. As Mr. Shidy's testimony is the only testimony which can be said to be (if it amounts to anything) in contradiction of the denials of the answer, it follows that it has no probative force, for the only testimony that could corroberate him if at all, is testimony which is inadmissible under the rule which forbids evidence of conversations had or statements made after the conveyance of the property.

There is but one remaining witness, JULIA C. BRADLEY.

The testimony of this witness completely overthrows the appellant's case. She says Mrs. Avery always spoke of it as her house. "Every time I met her; I do not think I met her that she did not say something about 'my house.'"

I believe I have given a fair synopsis of the appellant's evidence, taking up witness by witness. How in the world it can be said that it establishes a trust in this property passes my comprehension. If the rules of evidence, as taught in the law schools and in the text-books and announced by the courts, amount to anything, the facts set up in the bill as a ground of relief, so far from being proved, have been completely disproved by the complainant's own witnesses. The appellees needed no witness; their case was made out for them by the complainant itself. Giving to the testimony the most strained and favorable inferences in behalf of the appellants, the very utmost that can be said of it is that it presents a case very like those of Edgerly *vs.* Edgerly, 112 Mass., 175, and Lane *vs.* Lane, 80 Maine, 570. In the latter case the court said (p. 578), referring to the Massachusetts case:

"The case is much like that of Edgerly *vs.* Edgerly, 112 Mass., 175, where the court said: 'The only reasonable inference from all the facts proved is that while the husband did not intend to make a gift of the property to his wife which would deprive him of all benefits thereof, he did intend that the use

of the estate and the application of the income should rest in her discretion. So here the wife was, in any view, no more than a *discretionary* trustee, with the legal right to do with the property as she pleased, only that, under our statutes, she could not convey it in his lifetime without his joinder in her conveyance."

But on the whole case it is submitted—

1st. That there is no such testimony in this case as the law requires to overcome the sworn denial in the answer that Mr. Avery did not pay the purchase money.

2d. Nor the sworn denial that Mrs. Avery took the property in trust.

3rd. On the contrary the evidence of the plaintiff's own witnesses establishes clearly that Mrs. Avery always claimed this property as hers absolutely, and never at any time declared that it was conveyed to her upon any condition whatsoever.

## Confidential Communications Between Counsel and Client.

### Admissibility of the Evidence of the Witness Cox.

"In a case where an attorney was regarded as attorney for both husband and wife, he was not allowed to testify as to a conversation had with the wife, it being of a professional character."

Weeks on Attorneys, p. 270.
Scranton *vs.* Stewart, 52 Ind., 68.
Scott *vs.* Harris, 113 Ill., 440.

"The seal which the law once fixes upon such communications remains forever, unless removed by the party himself in whose favor it was there placed; and where the privilege belongs to *several* clients it is said no one of them, nor even a majority, contrary to the expressed will of the others, can waive the privilege so as to legally justify the attorney in giving testimony in relation to such privileged communications."

Weeks on Attorneys, p. 265.

Within the scope of the professional employment of an attorney the communications made to him by his client are privileged, and without the consent of the latter he should neither be required nor permitted by the courts of the United States to testify concerning them (Conn. Mut. Ins. Co. *vs.* Schaefer, 94 U. S., 457). See the emphatic language of Justice Bradley in that case, in which he says: "The protection of confidential communications made to professional advisers is dictated by a wise and liberal policy."

## The Thousand-Dollar Legacy.

Mr. Justice Hagner in his opinion in this case (p. 66) says:

"The conduct of the defendants in this respect has a wider effect than the mere forfeiture of the legacy. Their acts set in operation the law governing the principle of *election* which must apply to every person whom a will proposes in any particular to benefit. The defendants, with full knowledge of all the facts, are claiming the legacy of $1,000 given them by the will as free from all conditions, while they dispute the devise of the A-street lot, made by the same instrument to the complainant. This is at variance with the established rule that one cannot be allowed to claim under a will and against it."

The courts, it is true, have held that if A gives a legacy to B and in the same instrument devises *B's property* to C, B must elect whether he will accept the legacy and permit the devise to take effect, or reject the legacy and refuse to allow C to have the property. But the appellants insist that the testator has not devised *our* property. How, then, can the doctrine of *election* apply? If we elect to take the property we are told it is not ours to take. If we elect to take the legacy we are told we cannot have it, because we claimed the property. The more logical contention of the appellees is that they have never had an election put to them to take either the legacy or the A-street property, and they cannot, without a surrender by the appellant of its contention in regard to its ownership, have such an

election put to them. There is therefore no room whatever for any application to the case of the doctrine of election. It is perfectly clear that the testator never intended that we should make an election between taking the property or the legacy. He regarded the property as his, not ours, and supposed it would pass by his will. He never claimed to be devising our property. He had a right to devise our property and give us a legacy in lieu thereof, *if he so intended*, and the devise is good if we elect to accept the legacy. The question is, Did he intend to do so and to put us to an election? To put this question is not to dispute the will, but to ask, *probabilis causa litigandi*, for its construction. It is also a question directed to the ascertainment of a fact which cannot be ascertained from the face of the will itself, and therefrom to ascertain the intent of the testator, for if the testator believed this to be his property he could not have intended that we should be put to an election.

"The intention to raise an election must be clear and manifest from the will itself. The intention must be collected from the face of the instrument, and without a clear and express manifestation it cannot be presumed to extend to property which did not pass under the will."

Jones *vs.* Jones, 8 Gill, 198.
*In re* Gilmore, 81 Cal., 242.

Moreover, the appellant's claim that the terms of the will are such as to create a forfeiture of this $1,000 in case the legatees "dispute" the will is met by the well-settled doctrine that all forfeitures are to be strictly construed. It is submitted, therefore, that the testator's language in this particular must be taken in its strictest sense to mean "disputing" *the whole will in the manner wills are usually disputed, viz., by caveat.* The appellees are not disputing the whole will; indeed, they are not disputing any part of it. They concede it to be the will of the testator. They permitted it to be probated and ask that it be enforced. They do, however, dispute the claim of

the appellant that the testator ever intended to devise *our* property to it. He supposed he was devising his own and now that it turns out not to be his of course it does not pass.

It also seems to be the result of the authorities that if there exists *probabilis causa litigandi* the non-observance of the condition not to dispute a will, will not cause a forfeiture.

29 Am. Encyl. Law, 484, *note*, Jarman on Wills.
Roper on Legacies, Vol. 1, p. 795.

The language of the Court of Appeals as expressed in its opinion as to this question seems to clearly state the law. It said:

"With reference to the legacy of $1,000 given to the appellants by the testator, Robert S. Avery, and which is sought to be forfeited in this proceeding on account of the alleged disputing of the will by the appellants [the appellees here] it is not seriously controverted by the appellees [appellant] that the decree of the court below in that regard must be modified. Forfeiture is not greatly favored in equity under any circumstances; and this case is not one for the enforcement of a forfeiture. It may be suspected that the claim of the appellants [the heirs of Mrs. Avery] to the property in dispute was the very thing against which the testator was solicitous to guard; but clearer and more unequivocal language for that purpose should have been used to justify a court of equity in decreeing a forfeiture in this case. *Claiming property which it is contended did not pass under the will, cannot in any proper legal sense be regarded as a disputing of the will.*"

## Appellant's Brief.

Since the writing of the foregoing the appellant's brief has been handed us. A point not made by appellant's counsel in the court below now appears for the first time in his brief in this court, viz., that appellees have not denied the allegation in the bill of an express agreement, and therefore cannot take advantage of the statute of frauds, since they have not set it up. In reply we have to say that even if this contention may now

for the first time be considered, it applies, if at all, only to cases *between the parties to the original contract.* Thus, where A sues B, and sets forth B's alleged parol argreement, B, of course, must know whether he made such an agreement or not, and, if he did not make it, can make denial, which denial, under the rule laid down in May *vs.* Sloan, 101 U. S. 231, and Dunphy *vs.* Ryan, 116 U. S. 496, lets in the defense under the Statute of Frauds. But it is plain that a defendant not a party to the contract may have no knowledge of it whatever, not even enough upon which to base a belief as to whether it was or was not made. This is the case at bar, Mr. and Mrs. Avery resided in Washington, where the contract is alleged to have been made. The appellees resided in Connecticut and never heard of such an agreement until it was first alleged, more than ten years after it is said to have been made. All that they can swear to in such a case is to aver a want of knowledge and require strict proof of the alleged contract if it be *relevant.* This the defendants have done and the plaintiff having undertaken to make proof of the alleged contract has failed utterly to do so. The case in this particular as to lack of evidence is very much like that of May *vs.* Sloan, *supra.*

In that case Mr. Justice Bradley, speaking for this court, said:

"The object of this suit is to compel Asa May to convey to Sloan, the complainant, the Alvan May place according to what he alleges was the agreement and understanding between the parties, and the intent and meaning of the last clause in the agreement of January 5th, 1874. * * * Had the complainant succeeded in proving such an agreement it could not have availed him. *But the fact is he did not succeed in making such proof.* The evidence is conflicting on this subject. We have only that of the complainant himself, in which he is contradicted by the defendant and by Alvin May and by Pasco the attorney."

In the case at bar we have no "conflict" of testimony. The evidence is all one way (and established, moreover, by the complainant's own witnesses) that Mrs. Avery, so far from

making the alleged agreement always asserted the property to be hers, and not her husband's.

It is to be observed also, that this plaintiff does not allege in this bill specifically and in terms, that the contract was in parol, it alleges an express agreement—"it was expressly agreed" it is said—and from anything that appears in the bill it may be that a written agreement was meant, especially as it was in regard to real estate. The defendants not knowing what was meant, say in their answer that they have no knowledge of "any understanding or agreement, verbal or *otherwise* * * *" but if the alleged fact be true and relevant [and to be relevant it must be in *writing*] they require strict proof thereof." Thus giving notice that the contract, agreement or understanding is *not admitted*, which is the same in effect (upon the plaintiff's obligation to prove it) as if it were denied.

But, aside from all these considerations, the contract which the plaintiff sets up has its foundation in the alleged payment of the purchase-money by Mr. Avery, *This is expressly denied* by the defendants, and, hence the contract is denied.

But whether denied or not, the complainant was called upon to prove it, and, as we have seen, instead of doing so he has established affirmatively that it was Mrs. Avery's property and not the husband's.

We do not deem it necessary to take up the other points sought to be made in the elaborate brief of counsel for the appellant. They are all based upon the assumed existence of a fact which does not exist, to wit, the *contract*.

FRANKLIN H. MACKEY,
*Solicitor for Appellees.*